

IN THE SUPREME COURT OF THE STATE OF ALASKA

**Supreme Court No. S-17297
Superior Court No. 3AN-17-09910 CI**

**ESAU SINNOK, *et al.*,
Plaintiffs-Appellants,**

v.

**STATE OF ALASKA, *et al.*,
Defendants-Appellees**

**On Appeal from the Superior Court of the State of Alaska,
Third Judicial District at Anchorage,
The Honorable Gregory A. Miller, Presiding**

**BRIEF OF *AMICI CURIAE* LAW PROFESSORS
IN SUPPORT OF APPELLANTS**

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

The *amici curiae* are the thirty-one law professors and legal scholars from twenty-six law schools and universities listed on the signature page below.¹ These individuals have dedicated their careers to teaching, researching, and writing about environmental and natural resources law, climate law, and constitutional law, including many who teach courses devoted solely or primarily to these subjects. The *amici curiae* have published dozens of in-depth books, chapters, and articles, advised courts and governmental agencies, and taught thousands of law students the core principles of these subjects. They are thus among the nation's leading experts on the complex legal history and evolution of environmental rights and interests in the context of state and federal constitutional law.²

As educators and scholars in the law, the *amici curiae* have a compelling interest in informing this Court about the existence of a fundamental interest in a climate system that sustains human life and liberty under the Alaska Constitution and the State of Alaska's legal obligation to ensure that its decisionmaking is consistent with that interest. Indeed, the *amici curiae* offer a wealth of knowledge and expertise that will be indispensable to the Court in resolving constitutional issues arising from the climate crisis. The *amici curiae* are uniquely qualified to assist the Court in considering how substantive due process rights are applicable to issues involving greenhouse gas pollution and associated climate and societal disturbances. Although the merits of Appellants'

¹ *Amici curiae* are filing this brief solely as individuals and not on behalf of the institutions with which they are affiliated.

² The extensive expertise and scholarship of these law professors and scholars are described in more detail in the accompanying Motion for Leave to File Brief of *Amicus Curiae* Law Professors in Support of Appellants.

claims are not currently before the Court, the *amici curiae* offer their expertise to explain the validity of one of Appellants' substantive due process claims and to help demonstrate Appellants' likelihood of success on the merits if the Superior Court's dismissal is reversed.³

FACTUAL BACKGROUND

Climate warming has been occurring in Alaska at a pace twice the global rate for several decades, affecting Alaska more than any other state.⁴ Over the past 60 years, Alaska's average annual temperature has already increased by 3°F, and its average winter temperature has increased by 6°F.⁵ Average annual temperatures are projected to increase another 2°F to 4°F by 2050.⁶ This warming is causing disruptive and often devastating economic, cultural, and social consequences statewide, especially for young people whose health and livelihoods are strongly tied to the ecology and physical integrity of the State.

³ *Amici curiae* support all of Appellants' claims, including their equal protection, state-created danger, substantive due process, and public trust claims. In this brief, they are focusing on the substantive due process claim that there is a constitutionally protected interest in a stable climate system.

⁴ See Carl T. Markon, *et al.*, U.S. Global Change Research Program, *Ch. 26: Alaska*, in *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment*, vol. II, 1185, 1190-02 (2018), available at <http://doi.org/10.7930/NCA4.2018.CH26> (accessed Mar. 22, 2019); Patrick Taylor, *et al.*, U.S. Global Change Research Program, *Arctic Changes and their Effects on Alaska and the Rest of the United States*, in *Climate Science Special Report: Fourth National Climate Assessment*, vol. I, at 303, 304 (2017), available at <http://doi.org/10.7930/J00863GK> (accessed Mar. 22, 2019).

⁵ F. Stuart Chapin, *et al.*, U.S. Global Change Research Program, *Ch. 22: Alaska*, in *Climate Change Impacts in the United States: Third National Climate Assessment*, vol. II, at 516 (2014), available at <http://nca2014.globalchange.gov/report/regions/alaska> (accessed Mar. 25, 2019).

⁶ See *id.*

The Alaskan Arctic is also, “like the coal miner’s canary,” an “early warning to the rest of us of the extent to which the Earth’s climate is changing.”⁷ Melting glaciers, thawing permafrost, decreased sea ice cover, conversion of tundra to boreal forest, and other dramatic changes are already underway, and they are projected to accelerate.⁸ Summers will lengthen while winters shorten, leading to later fall freeze-up and earlier spring melting of sea ice.⁹

Thawing permafrost and eroding coastlines are causing infrastructure damage and creating an urgent need for community relocation in rural Alaska. Permafrost covers approximately 80% of the land area in Alaska and its northern barrier islands.¹⁰ The thawing of permafrost is leading to slumping land that damages infrastructure, such as buildings and roads, as well as the underground pipes that communities depend on for water supply, sewage removal, and heating.¹¹ Furthermore, sea ice along the western and northern coasts of Alaska is thinning and retreating, leaving the coastline ice-free for a

⁷ Edward W. Lempinen, *In Arctic Alaska, the Warming Climate Threatens an Ancient Culture*, 314 *Science* 609, 609 (Oct. 27, 2006), available at <http://doi.org/10.1126/science.314.5799.609> (accessed Mar. 19, 2019).

⁸ See generally Markon, *Ch. 26: Alaska*; Joan N. Larsen, *et al.*, *Polar Regions*, in *Climate Change 2014: Impacts, Adaptation, and Vulnerability, Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* 1567 (Cambridge Univ. Press 2014), available at <https://www.ipcc.ch/report/ar5/wg2/polar-regions/> (accessed Mar. 19, 2019).

⁹ See generally Markon, *Ch. 26: Alaska*; Taylor, *Arctic Changes*.

¹⁰ See T.E. Osterkamp & M.T. Jorgenson, *Permafrost conditions and processes*, in R. Young & L. Norby, *Geological Monitoring* (Geol. Soc’y America 2009), available at <https://www.nps.gov/articles/permafrost-geomonitoring.htm> (accessed Mar. 25, 2019).

¹¹ See Markon, *Ch. 26: Alaska*, at 1206-07. See generally April M. Melvin, *et al.*, *Climate change damages to Alaska public infrastructure*, 114 *Proc. Nat’l Acad. Sci.* E122 (Jan. 10, 2017), available at <https://doi.org/10.1073/pnas.1611056113> (accessed Mar. 19, 2019).

greater portion of the year and rendering the shorelines more vulnerable to waves and storm surges.¹² Sea-ice retreat also threatens the viability of traditional subsistence hunting and the safety of its practitioners, posing additional threats to people, food security, and cultural traditions in Alaska Native communities.¹³ Changing conditions that interfere with the practice of traditional hunting, travel, and other activities can also lead to psychological distress, poor health, and a reduction in communities' ability to adapt to the consequences of climate change.¹⁴

As a result of climate change, numerous Alaska Native villages, including Appellant Esau's village of Shishmaref, are facing imminent threats to life and safety from flooding, erosion, permafrost melting, and reduced sea-ice coverage. In fact, flooding and erosion of coastal and river areas are affecting over 87% of Alaska Native communities,¹⁵ and 26 of these have been identified as "Priority Action Communities" by

¹² See Markon, *Ch. 26: Alaska*, at 1198-99. See generally Ann E. Gibbs & Bruce M. Richmond, U.S. Geological Survey, *National Assessment of Shoreline Change: Historical Shoreline Change Along the North Coast of Alaska, U.S.-Canadian Border to Icy Cape*, Open-File Report 2015-1048 (2015), available at <https://dx.doi.org/10.3133/ofr20151048> (accessed Mar. 22, 2019).

¹³ See Markon, *Ch. 26: Alaska*, at 1192-93, 1200, 1204-06. See generally Todd J. Brinkman, *et al.*, *Arctic communities perceive climate impacts on access as a critical challenge to availability of subsistence resources*, 139 *Clim. Change* 413 (2016), available at <https://doi.org/10.1007/s10584-016-1819-6> (accessed Mar. 22, 2019).

¹⁴ See Markon, *Ch. 26: Alaska*, at 1203-06. See generally Daniel Dodgen, *et al.*, U.S. Global Change Research Program, *Ch. 8: Mental Health and Well-Being*, in *The Impacts of Climate Change on Human Health in the United States: A Scientific Assessment* 217 (2016), available at <http://dx.doi.org/10.7930/J0TX3C9H> (accessed Mar. 22, 2019).

¹⁵ See Markon, *Ch. 26: Alaska*, at 1198.

the U.S. Army Corps of Engineers.¹⁶ Many Alaska Native villages are actively exploring relocation options in light of these threats, and the remainder face the prospect of increasing climate-related hazards and the potential need to relocate.¹⁷ Infrastructure damage, community relocation, and other climate-related expenses are projected to cost the State between \$340 and \$700 million *annually* over the next 30 to 50 years.¹⁸

SUMMARY OF ARGUMENT

This Court should recognize that Appellants' interest in a climate system capable of sustaining human life and liberty (or "stable climate system" for ease of reference) is fundamental and constitutionally protected based on principles of substantive due process. This interest falls well within the intention and spirit of the Alaska Constitution, and it is necessary for the kind of civilized life and ordered liberty that lies at the core of our constitutional heritage. It is also deeply rooted in our nation's history and legal traditions. In light of Appellants' fundamental interest, the State of Alaska must ensure

¹⁶ See U.S. Army Corps Engineers-Alaska District, *Alaska Baseline Erosion Assessment: Study Findings and Technical Report*, at 4-1 to 4-8 (Mar. 2009), available at <https://www.poa.usace.army.mil/Portals/34/docs/civilworks/BEA/AlaskaBaselineErosionAssessmentBEAMainReport.pdf> (accessed Mar. 22, 2019).

¹⁷ See Robin Bronen, *Climate-induced community relocations: using integrated social-ecological assessments to foster adaptation and resilience*, 20 Ecol. & Soc'y 36 (2015), available at <http://dx.doi.org/10.5751/ES-07801-200336> (accessed Mar. 22, 2019).

¹⁸ See Matthew Berman & Jennifer Schmidt, Univ. Alaska-Anchorage, Inst. Soc. & Econ. Research, *Economic Effects of Climate Change in Alaska* (Amer. Meteor. Soc'y 2019), available at <https://doi.org/10.1175/WCAS-D-18-0056.1> (accessed Mar. 25, 2019). See also Melvin, *Climate change*, at E125, tbl. 2 (indicating climate-related damage just to infrastructure—such as roads, buildings, airports, railroads, and pipelines—is projected to cost the State approximately \$4.2 to \$5.5 billion for the period 2015-2099, unless extensive adaptation measures are implemented).

that its energy policy and other decisions are consistent with this interest,¹⁹ unless it can demonstrate that any actions adverse to it are justified by a compelling governmental interest that flows from an enumerated constitutional power.

This matter should be remanded to the Superior Court to allow for factual development and legal argument regarding whether and to what extent Alaska's energy policy is unduly infringing upon Appellant's fundamental interest in a stable climate system, and the government should be required to demonstrate whether and to what extent its interest in implementing such energy policy is compelling enough to override Appellants' fundamental interest.

ARGUMENT

I. SUBSTANTIVE DUE PROCESS FRAMEWORK

The U.S. Constitution and the Alaska Constitution contain very similar due process language.²⁰ Under both constitutions, "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."²¹ Federal and Alaska courts also use the same general framework for analyzing due process rights and responsibilities. The

¹⁹ When considering the appeal of a motion to dismiss, the Court must take as true, with all reasonable inferences in favor of Appellants, their allegations that the State of Alaska's energy policy—as reflected in AS § 44.99.115 and the State's systemic actions with respect to fossil fuels—is contributing to and exacerbating the climate crisis. *See Harper v. Biolife Energy Sys., Inc.*, 426 P.3d 1067, 1071 (Alaska 2018) (internal quotation omitted).

²⁰ While Appellants' substantive due process claim is based solely on the Alaska Constitution, not federal constitutional law, a discussion of the basic principles of substantive due process under both the U.S. and Alaska constitutions will be instructive for understanding how Alaska's constitutional law applies to Appellants' substantive due process claim.

²¹ U.S. Const. amend. V (applicable to federal government). *Accord id.* amend. XIV (applicable to state governments); Alaska Const. art. I § 7.

concept of due process has a procedural component and a substantive component, both of which are based on principles of fundamental fairness.²² With respect to procedural due process, the government can only deprive a person of constitutionally protected rights or interests through the use of appropriate legal procedures, such as advance notice, an opportunity for written submissions, or an evidentiary hearing.²³ Substantive due process, on the other hand, constrains the government from infringing upon fundamental rights and interests regardless of what procedure is used.²⁴

The rights and interests protected by substantive due process are constantly evolving. As eloquently put by Justice Brennan:

[T]he genius of our Constitution resides not in any static meaning that it had in a world that is dead and gone, but in the adaptability of its great principles to cope with the problems of a developing America. A principle to be vital must be of wider application than the mischief that gave it birth. Constitutions are not ephemeral documents, designed to meet passing occasions. The future is their care, and therefore, in their application, our contemplation cannot be only what has been but what may be.²⁵

The U.S. Supreme Court recently underscored this principle, stating that “[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted

²² See generally, e.g., *Matthews v. Eldridge*, 424 U.S. 319 (1976) (procedural due process); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (substantive due process); *Johns v. Comm’l Entry Fish’s Comm’n*, 699 P.2d 334 (Alaska 1985) (procedural due process); *Breese v. Smith*, 501 P.2d 159 (Alaska 2006) (substantive due process).

²³ See *Matthews*, at 333-49; *Johns*, at 338-40.

²⁴ See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Meyer*, at 399-403; *Breese*, at 169-75.

²⁵ William J. Brennan, Jr. *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 495 (1977), available at https://www.law.berkeley.edu/wp-content/uploads/2017/07/Brennan-90_HVLR_489.pdf (accessed Mar. 19, 2019).

to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.”²⁶

Fundamental rights and interests thus cannot be reduced to any formula.²⁷ Instead, courts must “exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect.”²⁸ To determine whether a right or interest is constitutionally protected for purposes of substantive due process, the U.S. Supreme Court generally looks to whether it is “deeply rooted in this Nation’s history and tradition”²⁹ or “fundamental to our [nation’s] scheme of ordered liberty.”³⁰ In other words, substantive due process requires that “state action . . . shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.”³¹ Similarly, this Court has repeatedly acknowledged that the judiciary has a “duty” under the Alaska Constitution to recognize “fundamental rights and privileges” where they are “within the intention and spirit of our local constitutional language and . . . necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.”³²

Over the past century, the U.S. Supreme Court has recognized a wide range of

²⁶ *Obergefell v. Hodges*, 135 S.Ct. 2584, 2598 (2015).

²⁷ *See id.*

²⁸ *Id.*

²⁹ *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

³⁰ *Id.* (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)) (emphasis omitted).

³¹ *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926).

³² *Valley Hosp. Ass’n v. Mat-Su Coal’n Choice*, 948 P.2d 963, 967 (Alaska 1997) (quoting *Baker v. City of Fairbanks*, 471 P.2d 386, 401-02 (Alaska 1970)). *See Breese*, at 169 n. 43 (quoting *Baker*, at 402).

fundamental rights and interests,³³ including education and acquisition of knowledge,³⁴ political affiliation,³⁵ procreation,³⁶ self-defense,³⁷ bodily integrity,³⁸ contraception,³⁹ abortion,⁴⁰ sexual intimacy,⁴¹ and marriage.⁴² Many of the landmark cases recognizing fundamental interests have involved the interests of children.⁴³ Likewise, in Alaska, it is an “established premise that children are possessed of fundamental rights” protected by the Alaska Constitution.⁴⁴

The two constitutions diverge, however, in the scope of fundamental rights and interests. The Alaska Constitution provides broader protection than the U.S. Constitution, and this is to be expected. According to Justice Brennan, state constitutions serve as a “font of individual liberties, their protections often extending beyond those

³³ In addition to specifically enumerated rights and interests, the U.S. Constitution recognizes the existence of a wide range of unenumerated rights and interests. *See* U.S. Const. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

³⁴ *See, e.g., Meyer.*

³⁵ *See, e.g., Schware v. New Mexico Bd. Bar Exam’s*, 353 U.S. 232 (1957).

³⁶ *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535 (1942).

³⁷ *See, e.g., McDonald.*

³⁸ *See, e.g., Riggins v. Nevada*, 504 U.S. 127 (1992); *Rochin v. California*, 342 U.S. 165 (1952).

³⁹ *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁴⁰ *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973).

⁴¹ *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴² *See, e.g., Obergefell; Loving v. Virginia*, 388 U.S. 1 (1967).

⁴³ *See, e.g., Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) (recognizing the “rights of children to exercise their religion”); *Tinker v. Des Moines Ind. Comm’y Sch. Dist.*, 393 U.S. 503, 511-14 (1969) (explaining that “[s]tudents in school as well as out of school . . . are possessed of fundamental rights which the State must respect,” including the right to wear black armbands in protest of war).

⁴⁴ *Breese*, at 167 (citing *RLR v. Alaska*, 487 P.2d 27 (Alaska 1971) and *Doe v. Alaska*, 487 P.2d 47 (Alaska 1971)).

required by the Supreme Court's interpretation of federal law."⁴⁵ At its outset, the Alaska Constitution declares that it is "dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry."⁴⁶ The Alaska Constitution also provides explicit protection for privacy rights.⁴⁷ This Court has repeatedly called attention to the greater protections afforded by the Alaska Constitution:

Although the federal constitution sets the minimum protections afforded to individual liberty and privacy interests, the Alaska Constitution often provides more protection.⁴⁸ We have specifically recognized that Alaska's guarantee of privacy is broader than the federal constitution's:

Since the citizens of Alaska, with their strong emphasis on individual liberty, enacted an amendment to the Alaska Constitution expressly providing for a right to privacy not found in the United States Constitution, it can only be concluded that the right is broader in scope than that of the Federal Constitution.⁴⁹

We have similarly declared Alaska's constitutional guarantee of individual liberty to be more protective.⁵⁰

The U.S. Constitution and federal case law discussed above therefore serve as a floor to inform the Alaska-specific analysis.

One example of a fundamental right recognized in Alaska, above and beyond

⁴⁵ Brennan, *State Constitutions*, at 491.

⁴⁶ Alaska Const. art. I § 1.

⁴⁷ See *id.* art. I § 22; *Myers v. Alaska Psych. Inst.*, 138 P.3d 238, 245 (Alaska 2006).

⁴⁸ *Myers*, at 245 (citing *Valley Hosp.*, at 966-67).

⁴⁹ *Id.* (quoting *Anchorage Pol. Dept. Empl's Ass'n v. Municipality of Anchorage*, 24 P.3d 547, 550 (Alaska 2001)). See also *Breese*, at 167 ("Thus, in the case at bar, although sound analysis requires that we look to the various federal precedents that have interpreted provisions of the federal constitution that parallel Alaska's constitution, we are not necessarily limited by those precedents in expounding upon Alaska's constitution").

⁵⁰ *Myers*, at 245 (citing *Breese*, at 170).

federally recognized liberty interests, is the right of students to wear their hair in accordance with personal tastes without government interference.⁵¹ In *Breese*, this Court determined that, even if the rules adopted by a “single school official” had been promulgated through a more democratic process, “a student’s claim to liberty would remain undiminished, for this court is held to a standard of vigilance in the matter of the protection of an individual’s constitutional liberties.”⁵²

After it has been shown that a constitutionally protected due process interest is involved and has been impaired by governmental action, the government must demonstrate that the impairment is justified by a “compelling governmental interest.”⁵³

If an individual right is vested by the Constitution, the overriding demands of governmental efficiency must be of a compelling nature and must be identifiable as flowing from some enumerated constitutional power.⁵⁴

Under this rigorous standard, courts must closely examine the government’s asserted justification for its infringement of constitutionally protected interests. By compelling courts to engage in careful scrutiny, the standard “comports with the kind of ordered liberty which represents the core of Alaska’s constitutional heritage” and affords the necessary degree of protection for fundamental rights and interests.⁵⁵

II. APPELLANTS HAVE A FUNDAMENTAL INTEREST IN A STABLE CLIMATE SYSTEM THAT IS PROTECTED BY THE ALASKA CONSTITUTION.

The young Appellants have a fundamental interest in a climate system capable of

⁵¹ See *Breese*.

⁵² *Id.* at 174.

⁵³ *Breese*, at 171.

⁵⁴ *Baker*, at 394.

⁵⁵ *Breese*, at 172.

sustaining human life and liberty. This interest falls “within the intention and spirit” of Alaska’s constitutional language, and it is “necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.”⁵⁶

Several provisions of the Alaska Constitution help demonstrate the existence of such an interest. Article I provides that the government “is instituted solely for the good of the people as a whole.”⁵⁷ Similarly, Article VIII provides that the development of natural resources must be “consistent with the public interest” and “for the maximum benefit of its people.”⁵⁸ Under this language, this Court has determined, for example, that it is unconstitutional for the Alaska Department of Natural Resources to issue only a single “best interest finding” during the initial phase of a proposed oil and gas development because, at that early stage, it is “impossible to assess the cumulative effects of the development as they relate to DNR’s continuing obligation to consider the public’s best interest.”⁵⁹ As such, the Court held that the agency is “constitutionally required” to ensure that development is “consistent with the public interest” at all phases of an oil and gas project.⁶⁰ Alaska’s state agencies therefore have a general constitutional duty to ensure that their decisions relating to oil, gas, and other natural resources are consistent with the public’s best interest. The existence of this general duty is consistent with and provides support for Alaskans’ fundamental interest in a stable climate system and a

⁵⁶ *Valley Hosp.*, at 967.

⁵⁷ Alaska Const. art. I § 2.

⁵⁸ *Id.* art. VIII §§ 1, 2.

⁵⁹ *Sullivan v. Resisting Envtl. Destr. Indigenous Lands*, 311 P.3d 625 (Alaska 2013) (quoting with approval the Superior Court’s order in the matter being appealed, Civ. No. 3AN-10-04217 CI (Feb. 22, 2011)).

⁶⁰ *Id.* at 637. *See id.* 634-37.

corresponding obligation on the part of the government to ensure that its decisions relating to natural resources comport with this interest.

The fundamental interest in a stable climate system and its consistency with the intention and spirit of Alaska's Constitution are informed by other constitutional language as well. For instance, the "common use" clause within Article VIII was intended to "constitutionalize historic common law principles governing the sovereign's authority" over management of natural resources.⁶¹ Under the ancient common law public trust doctrine, the government "holds certain resources (such as wildlife, minerals, and water rights) in trust for public use" and "owes a fiduciary duty to manage such resources for the common good of the public as beneficiary."⁶² Governmental decisionmaking relating to natural resources must therefore take into account the need to "provide for future generations" and recognize that "income generation is not the sole purpose of the trust relationship."⁶³ In other words, Article VIII requires "natural resources be managed for the benefit of all Alaskans,"⁶⁴ rather than for the near-term benefit of the government, corporations, or private individuals to the detriment of

⁶¹ *Owsicheck v. Alaska Guide Lic'g Contr. Bd.*, 763 P.2d 488, 494 (Alaska 1988). See *Manning v. Alaska Dept. Fish Game*, 355 P.3d 530, 538 n. 44 (Alaska 2015).

⁶² *Baxley v. Alaska Dept. Nat. Res.*, 958 P.2d 422, 434 (Alaska 1998) (quotation omitted). See generally *Owsicheck*, at 496 (describing *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892), as the "lodestar of American public trust law"); Raphael D. Sagarin & Mary Turnipseed, *The Public Trust Doctrine: Where Ecology Meets Natural Resources Management*, 37 Ann. Rev. Env't. & Res. 473 (Nov. 2012) (describing the ancient roots and modern applicability of the public trust doctrine), available at <http://dx.doi.org/10.1146/annurev-environ-031411-165249> (accessed Mar. 24, 2019).

⁶³ *Brooks v. Wright*, 971 P.2d 1025, 1032 (Alaska 1999) (citing Alaska Const. art. VIII §§ 1, 4).

⁶⁴ *Brooks*, at 1031 (citations omitted).

children and posterity.

Additional constitutional language also informs and supports recognition of the young Appellants' fundamental interest in a stable climate system. Natural resource management must be governed by principles of "conservation" and "sustained yield;"⁶⁵ everyone should be treated "equally" by resource management rules;⁶⁶ and governmental decisionmaking relating to resource development must be carried out in a manner consistent with due process and equal protection.⁶⁷ Based on these principles, a fundamental interest in a stable climate system and a corresponding governmental duty to ensure its decisions concerning natural resources are consistent with this interest fall well within the intention and spirit of the Alaska Constitution.

Recognition of a fundamental interest is also warranted because a climate system capable of sustaining human life is "necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage."⁶⁸ The young Appellants' core constitutional rights to life, liberty, and the pursuit of happiness are threatened by climate change because, as discussed above, their communities are already experiencing the thawing of permafrost, erosion of coastlines, infrastructure damage, cultural impairment, threats to life and health, diminishment of subsistence resources, and the need for relocation, and all of this will impose staggering costs on the State government and taxpayers.

⁶⁵ Alaska Const. art. VIII §§ 2, 4.

⁶⁶ *Id.* art. VIII § 17.

⁶⁷ *Id.* art. I §§ 1, 7.

⁶⁸ *Valley Hosp.*, at 967.

The interest in a stable climate system is also one “underlying and supporting other vital liberties.”⁶⁹ Like voting and marriage, a stable climate system is a “keystone of our social order”⁷⁰ and “fundamental to our very existence and survival.”⁷¹ Indeed, a stable climate system is imperative for the continued existence of human life, the exercise of constitutionally protected liberties, the preservation of a civilized future, and the pursuit of happiness and well-being.⁷²

From a historical perspective, the existence of a fundamental and constitutionally protected interest in a stable climate system is deeply rooted in our nation’s history and legal traditions.⁷³ James Madison, for instance, wrote that, for humans, animals, and

⁶⁹ *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016) (appeal pending) (citing *Obergefell*, at 2599).

⁷⁰ *Obergefell*, at 2601. See *Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (explaining that voting is “regarded as a fundamental political right, because preservative of all rights”).

⁷¹ *Loving*, at 12. See *id.* (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”).

⁷² Several other nations have found that fundamental environmental rights are constitutionally protected for similar reasons. See James May & Erin Daly, *Constitutional Environmental Rights Worldwide*, in *Principles of Constitutional Environmental Law* 329, 331-36 (Amer. Bar Assoc., 2011), available at <https://ssrn.com/abstract=1932779> (accessed Mar. 19, 2019). The Supreme Court of India, for example, found that the right to life in India’s constitution encompasses the right to a quality environment. See Elizabeth F. Valentine, *Arguments in Support of a Constitutional Right to Atmospheric Integrity*, 32 *Pace Env’tl. L. Rev.* 56, 77 (2015), available at <http://digitalcommons.pace.edu/pelr/vol32/iss1/2> (accessed Mar. 19, 2019) (citing *Subhash Kumar v. State of Bihar*, A.I.R. 1991 S.C. 420 (India)).

⁷³ See Irma S. Russell, *Listening to the Silence: Implementing Constitutional Environmentalism in the United States*, in Erin Daly & James R. May eds., *Implementing Environmental Constitutionalism: Current Global Challenges* 209 (Cambridge Univ. Press 2018), available at <https://books.google.com/books?isbn=1107165180> (accessed Mar. 24, 2018).

plants, “the atmosphere is the breath of life. Deprived of it, they all equally perish.”⁷⁴

Moreover, in an 1893 international arbitration, the United States emphasized that rights to basic survival resources are inalienable and that to consume or destroy them is a “notion so repugnant to reason as scarcely to need formal refutation.”⁷⁵

More generally, the framers saw environmental protection as a matter of intergenerational justice that is fundamental to the nation’s liberty. Thomas Jefferson, for instance, wrote that the laws of nature imposed upon the nation a duty to protect “the whole soil of their country” for the benefit of present and future generations:

Are [later generations] bound . . . to consider the preceding generation as having had a right to eat up the whole soil of their country in the course of a life, to alienate it from them . . . and would they think themselves either legally or morally bound to give up their country, and emigrate to another for subsistence? [E]very one will say No: that the soil is the gift of God to the living, as much as it had been to the deceased generation⁷⁶

The framers also linked the quality of America’s lands to the nation’s “happiness, dignity and independence.”⁷⁷ The young Appellants’ happiness, dignity, and independence likewise depend on a climate system capable of supporting human life and liberty, and their interest in such a system should be recognized as fundamental under the Alaska

⁷⁴ James Madison, *Address to the Agricultural Society of Albemarle* (May 12, 1818), available at <https://founders.archives.gov/documents/Madison/04-01-02-0244> (accessed Mar. 19, 2019).

⁷⁵ Fur Seal Arbitration, Argument of the United States, Feb. 29, 1892 (Govt. Printing Office, 1893), available at <https://open.library.ubc.ca/media/download/pdf/bcbooks/1.0222414/0> (accessed Mar. 19, 2019).

⁷⁶ Thomas Jefferson, *Letter to John Wayles Eppes* (June 24, 1813), available at <https://founders.archives.gov/documents/Jefferson/03-06-02-0200> (accessed Mar. 19, 2019).

⁷⁷ Andrea Wulf, Expert Report, Doc. 269-1, at 5-6, 11, *Juliana v. United States*, Case No. 6:15-cv-01517-TC (June 28, 2018).

Constitution.

III. THE STATE OF ALASKA BEARS A HEAVY BURDEN TO DEMONSTRATE THAT ANY INFRINGEMENT OF APPELLANT’S FUNDAMENTAL INTEREST IN A STABLE CLIMATE SYSTEM IS JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST.

In light of the young Appellants’ fundamental interest in a stable climate system, as described above, the State of Alaska bears the heavy burden of demonstrating that any decisions it makes adversely affecting their fundamental interest are justified by a “compelling governmental interest”⁷⁸ that flows from an “enumerated constitutional power.”⁷⁹ Under this rigorous standard, as explained above, courts must closely examine the government’s asserted justification for its infringement of constitutionally protected interests. By compelling courts to engage in careful scrutiny, the standard “comports with the kind of ordered liberty which represents the core of Alaska’s constitutional heritage” and affords the necessary degree of protection for fundamental rights and interests.⁸⁰

Since the Appellants’ substantive due process claim and other claims were dismissed before reaching the merits, they have not had an opportunity to fully brief and explain in detail how Alaska’s energy policy infringes upon their fundamental interest in a stable climate system. Moreover, the State of Alaska has not presented any evidence demonstrating that its interest in implementing such energy policy is of a sufficiently compelling nature to override Appellants’ fundamental interest. This matter should be

⁷⁸ *Breese*, at 171. *See Washington*, at 721.

⁷⁹ *Baker*, at 394.

⁸⁰ *Breese*, at 172.

remanded to allow for factual development and legal argument concerning whether and to what extent Alaska's energy policy is unduly infringing upon the fundamental interest of young people to a climate system capable of supporting their physical, cultural, and spiritual survival, as well as their health, safety, future prospects, and ability to exercise constitutionally protected liberties.


CONCLUSION

For the foregoing reasons, this Court should reverse the dismissal of Appellant's complaint so the parties can present evidence and argument concerning the substantive due process issues discussed above and so that the young Appellants will have an opportunity protect their fundamental interest in a climate system that sustains human life and liberty.

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Respectfully submitted,
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